HIGH COURT OF UTTARANCHAL AT NAINITAL.

Second Appeal No. 56 of 2006

Union of India through the Defence Estate Officer, Meerut Circle, Meerut Cantt. Meerut.

... **Appellant.**

Versus

1. Sri Ashok Kumar Gupta, S/O Late Sri Hari Kishore Gupta through its General Power of Attorney Holder Sri Satish Sondhi S/O Sri Banarsi Lal, R/O 111, Rajpur Road, Dehradun.
2. Sri Sumeet Sondhi S/O Satish Sondhi, R/O 111, Rajpur Road, Dehradun through its General Power of Attorney Holder Sri Satish Sondhi, S/O Sri Banarsi Lal R/O 111, Rajpur Road, Dehradun.

... **Respondents.**

Sri Arvind Vashist learned counsel for the appellant.
Sri Alok Singh, Sr. Adv. assisted by Sri Dharmendra Barthwal, learned counsel for the respondents.

Date December 04, 2006.

Hon. B.S. Verma, J.

This Second Appeal has been preferred against the judgment and decree dated 31-5-2004 passed by the then District Judge, Dehradun, in Civil Appeal No. 9 of 2004, Ashok Kumar Gupta and another Vs. Union of India whereby the appeal preferred by the defendant-appellant was dismissed.

Relevant facts of the case are that plaintiffs Ashok Kumar Gupta and another filed a suit for permanent injunction against the Union of India with the allegation that the plaintiffs are owner of the property bearing No. 111, Rajpur Road, Dehradun. In the year 1994 Commanding Officer of 501 Field Survey Engineering Group Dehradun stated barbed wire fencing towards southern side of their property. The plaintiffs moved the petition before the Collector, who got the matter investigated through Tehsildar and he ultimately held that the property mentioned in schedule was not the property of the defendant. Accordingly, the defendant was asked by

the S.D.M. to remove the barbed wire fencing from a portion of the disputed property but to no avail. However, in December 1995, the defendant-appellant removed its fence and the plaintiffs started putting their construction material thereon. Again, the defendant started putting temporary barbed wires. The plaintiff informed the District Authorities and sent the notice to the defendant but despite the order of the S.D.M. Dehradun placed tree branched, pillars and fencing over the disputed property. Hence the suit was filed.

Defendant filed its written statement denied the plaint allegations and pleaded that the plaintiffs are not the owners. According to the defendant, the property in disputed was owned by them and is also recorded in the name of the defendant. The defendant-Union of India also disputed the possession of the plaintiffs over the suit land. It was asserted that the suit land was taken by X-ray institute in the year 1905-06, which was later-on devolved in the defendant Department in the year 1934 and since then defendant is in possession of the suit land for which defendant-appellant paid amount of Rs. 2,15,000/- on 11-1-1936. It was also stated that the suit was barred by Section 10 of the CPC.

The trial court framed necessary issues in the suit, recorded the evidence led by the parties and after hearing both the parties held that the plaintiffs are the owner in possession of suit property, that the suit is not barred by the provisions of Section 80 of the C.P.C., that the provisions of Section 10 of the C.P.C. were not attracted and ultimately the suit was decreed. The Union of India-defendant went up in appeal, but the appellant court also did not find favour with the defendant and dismissed the appeal on merit.

I have heard learned counsel for both the parties and perused the record.

The only question for determination in this appeal is whether the finding of the courts below that plaintiffs have right, title

and interested over the suit property is based on no evidence or misreading of evidence. If the answer be in affirmative, then and only then, there will be scope of interference by this Court in second appeal.

The District Judge while deciding the appeal has observed that the property in question was initially owned by one Smt. Mohini Devi, who executed a registered will deed in favour of the plaintiff Ashok Kumar Gupta (son of the said Mohini Devi). Smt. Mohini Devi occupied the property in question by way of an award dated 2-12-1957 given by the arbitrator which was made Rule of the Court in Suit No. 102 of 1958, thereby the property no. 111, Rajpur Road, Dehradun was given in equal share in favour of Smt. Indumati and Mohani Devi. Subsequently, proceedings under the Ceiling Act were drawn and the Competent Authority found that the land in dispute did not fall within the purview of the Urban Ceiling Act. Said Ashok Kumar Gupta transferred a part of the land by sale in favour of plaintiff no.2. Before the trial court, the plaintiff-respondents have filed certified copies of the public documents, Exts. 5 to 7. It has been observed by the trial court as well as appellate court that the documentary evidence led by the plaintiff-respondents were sufficient to establish that the disputed property had been encroached upon in illegal manner by the defendant-appellant.

The appellate (defendant) had in fact not produced any evidence by the trial court to substantiate its right or title with regard to the suit land. In documentary evidence photocopy of a map paper no. 60-C was filed, but no effort was made by the defendant-appellant to prove it by secondary evidence. The trial court for want of proof did not rely upon the said map and ignored the photocopy of the map. It has been rightly concluded that by merely filing photocopy of the map, it could not establish the right, title or authority of the defendant over the suit land. The witness produced by the defendant D.W.1 Shivanand has stated that he did not have

any knowledge with regard to the disputed land. From a perusal of the record it can be held that both the courts below rightly discarded the contention of the defendant-appellant on all material issues. It may also be added that the finding regarding possession is based on proper appreciation of the evidence and the finding of possession is a finding of fact.

Learned counsel for the appellant has vehemently submitted that the plaintiff-respondents did not appear before the trial court to prove their case. Their attorney holder appeared before the trial court, therefore, the learned trial court wrongly relied upon the statement of the plaintiffs and decreed the suit. It was further argued that by the learned Assistant Soliciter General for the Union of India that initially the suit was filed for mandatory and prohibitory injunction; but only a decree for permanent injunction has been passed.

It is not disputed that during the pendency of the suit, the barbed wire fencing had been removed by the defendant-appellant from the suit land and to that effect the plaintiff's witness Satish Sondhi, P.W.1 in his examination-in-chief has given statement. On this strength, the learned counsel for the respondents submitted that the relief for prohibitory injunction has become infructuous. The suit was therefore rightly decreed for permanent injunction.

Besides, both the courts below, the trial court as well as the appellate court placed reliance upon the judgment of the Appellate Court, i.e. District Judge passed in Urban Land Ceiling Appeal No. 17 of 1981 Smt. Mohini Devi Vs. State of U.P. and another, thereby the surplus vacant land was reduced to 188.07 sq.mt. The plaintiff-respondents also relied upon the certified copy of map (22-C and copy of order dated 29-9-1994 of the Competent Authority (Ext. 11). Both the courts below have rightly relied upon the documentary evidence of the plaintiff-respondents being certified

copies sf public documents coupled with the testimony of P.W.1 o;n the point of possession. In addition to that, it is not disputed that the Sub Divisional Magistrate Dehradun also sent a letter to the Commanding Officer-defendant to remove the barbed wire fencing put by it in unauthorized manner over the land in question. The case of the plaintiff-respondents stands established by concrete, reliable and trust worthy evidence filed on record. The defendant-appellant could not leave any evidence to substantiate its contention that the suit is barred by the provisions of Section 80 C.P.C. or as per the provisions of Section 10 C.P.C., the suit ought to have been stayed.

Having perused the impugned judgment and decrees, it is obvious that there is no perversity in appraisal of the evidence. The findings have been arrived on the basis of evidence on record. Accordingly, the question is answered in negative. I am in complete agreement with the findings recorded by the two courts below. It would suffice to mention that both the courts below have recorded concurrent findings and it will be of no use to reiterate the reasons given by the two courts below. I therefore hold that no substantial question of law is involved in the second appeal. It is settled law that the High Court in Second Appeal cannot proceed to re-appreciate the evidence and unless perversity in the finding of fact arising out of misreading of evidence and without evidence is shown, finding of facts arrived at by the courts below cannot be disturbed. I am fortified in my view by the Apex Court verdict in the case of ***Girijanandini Devi Vs. Bijendra Narain Choudhary [AIR 1967, Supreme Court Page 1124*** and ***"Santosh Hazari Vs. Purushottam Tiwari [AIR 2001 SC Page 965].***

The Apex Court in the case of Santosh Hazari (supra) observed that "*We need only remind the first appellate courts of the additional obligation case on them by the scheme of the present section 100 substitute in the Code. The first appellate court continues, as before, to be a final court of facts, pure findings of fact remain immune from challenge before the High Court in second*

appeal". The apex court also held that now the first appellate court is also a final court of law in the sense that its decision on a question of law even if erroneous may not be vulnerable before the High Court in the second appeal because the jurisdiction of the High Court has now ceased to be available to correct the errors of law or the erroneous findings of the first appellate court even on question of law unless such question of law be a substantial one.

The Apex Court in the case of ***Rajeshwari Vs. Puran Indoria 2005 (7) SCC Page 60*** has held in paragraph no. 8 that "before parting, we feel that we would be justified in pointing out that the amendment brought to section 100 of the Code w.e.f. 1.2.1977 by Act 104 of 1976, has really not advanced the cause of justice. Earlier, interference could be had under section 100 of the Code if the decision was contrary to law or some usage having the force of law; or the decision had failed to determine some material issue of law or usage having the force of law; or suffered from substantial error or defect in the procedure provided by the Code or any other law for the time being in force, which may possibly have produced the error or defect in the decision of the case upon the merits. The provision enabled the court to correct the errors of law or of procedure in an appropriate case and even unreasonable appreciation of evidence could have been brought within the contours of errors of law in the circumstances of a given case. <u>But by introducing the concept of "substantial question of law" in section 100 CPC, the right of the litigant to have a decision after a reappraisal of the relevant materials by the High Court has been curtailed.</u> Though courts of first appeal are made the final courts of facts, there are instances when the first appellate courts merely, mechanically confirm the findings of fact rendered by the trial court without an independent reappraisal of the pleadings and the evidence in the case. Since a judgment of affirmance need not be as elaborate as a judgment reversing the decision of the court below, it is often contended that the judgment of the appellate court satisfies the requirements of Order 41 Rule 31 of the Code. There are occasions

when the High Court feels the constraint of section 100 and reluctantly declines to interfere though interference would have been proper to render justice between the parties. The High Courts are often confronted with an argument that even if what was involved was mixed question of fact and law or even a question of law, that did not constitute a substantial question of law justifying interference under section 100 of the Code. Why cannot an error of law committed by the appellate court be corrected in the second appeal? Why should not a litigant have an opportunity of having the decision in his case corrected for an error of law by the High Court at the second appeal stage? When a substantial question of law as expounded by this Court is only an open question of law substantial as between the parties, a restoration of the position as it existed prior to 01.02.1977 does not appear to be reopening of the door too wide."

The cumulative effect of the Apex Court Judgments referred to above is that it is settled law that the scope of jurisdiction of the High Court in second appeal under Section 100 of the Code f Civil Procedure is limited to 'substantial questions of law.' In ***Santosh Hazari case (supra)*** it has been observed that to be a substantial question of law, it must be debatable, not previously settled by the law of the land or a binding precedent and answer to the same will have a material bearing as to the rights of the parties before the court.

In view of the discussion above, no "substantial" question of law is involved for determination in this appeal, therefore, the second appeal is liable to be dismissed at admission stage.

The appeal is hereby dismissed in-limine. All the pending miscellaneous application(s) in the appeal, if any, shall stand disposed of accordingly.

(B.S. Verma, J.)

RCP